

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of: BWBC, Inc.

Serial No.: 76 / 711077

Filed: March 30, 2012.

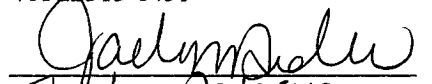
Mark: COW CREEK

Examining Attorney: Michael Webster

Law Office: 102

Trademark Trial and Appeal Board,
U.S. Patent and Trademark Office
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Alexandria, VA 22313-1451

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REPLY BRIEF FOR APPLICANT-APPELLANT

INDEX OF REFERENCES.



02-09-2015

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Other Sources.

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TMEP §1201.01(b)(v)3

I. ARGUMENT.

i. Examining Attorney Claims Definitions of “Cow” and “Bull” are “Irrelevant.”

The Examining Attorney argues that “[w]hether the terms ‘cow’ and ‘bull’ are *interchangeable* is *irrelevant*.”¹ Rather, he contends the marks are confusingly similar because they “identify a *creek* named for a *similar* type of bovine.”²

Applicant addressed this overreach in its Brief. Specifically, taken to its ultimate conclusion, this reasoning would bar anyone from registering a mark for beer that included any variant of a bovine, followed by “creek.” That is, the registration for “Bull Creek Brewery” would prohibit registration of “Heifer Creek,” “Calf Creek,” or “Steer Creek.” This grants the registrant of “Bull Creek Brewery” a broader franchise than he either applied for, or is entitled to from the Patent and Trademark Office. And it begs a question originally noted in Applicant’s Brief: Would a registration for “Dog Creek” beer preclude registration of “Bitch Creek”; or similarly, would a registration for “Hen Creek” preclude registration of “Rooster Creek”?

Contrary to the Examining Attorney’s argument, the meaning of “cow” versus “bull” and whether they are “interchangeable,” is not irrelevant. As discussed in Applicant’s Brief, federal appellate courts and the TTAB have repeatedly found no likelihood of confusion where one mark

¹ See p.4 of Response Brief (emphasis added).

² Id.

was merely a subset of another – *i.e.*, the meanings were neither “synonymous” nor “identical.”³ That is, whether the marks were “interchangeable” *was* relevant to determining likelihood of confusion.

Moreover, two of the cases directly contradict the Examining Attorney’s argument that the common term “creek” renders the meanings of “bull” and “cow” “irrelevant.” These involved the marks “Dawn Donut” versus “Daylight Donut”, and “Railbird” versus “Game Bird”; the latter two marks being used for hats.⁴ In both, the courts found that, although one of the terms was a subset of the other, they were neither “synonymous” nor “identical” and, therefore, confusion was unlikely.⁵ More importantly, both marks contained common terms, and neither court disregarded the meanings of the uncommon terms as “irrelevant” simply because both marks shared the common terms.⁶

Finally, TMEP §1201.01(b)(v) allows comparison of meaning to determine likelihood of confusion. Both cases cited by the rule found a likelihood of confusion where terms were “used interchangeably” or were “synonyms for one another.”⁷ So, “interchangeab[ility]” is not “irrelevant.” That is, “interchangeable” terms can create a likelihood of confusion, whereas

³ See pp.14-15 of Applicant’s Brief discussing *Hat Corporation of America v. John B. Stetson Company*, 223 F.2d 485, 486-489 (C.C.P.A. 1955) (finding that “Railbird” and “Game Bird” not confusing because, although former was subset of the latter, the terms were not “identical” or “synonymous”), *Dawn Donut Company, Inc. v. Daylight Donut Flour Company*, 450 F.2d 332, 333 (10th Cir. 1971) (finding that “Dawn Donut” and “Daylight Donut” not confusing, although “Dawn” was a subset of “Daylight,” because “the words are not synonymous”), and *Roush Bakery Products Co., Inc. v. Mountain Mamma, Inc.*, 185 U.S.P.Q. 55 (TTAB 1974) (finding that no confusion between “mountain mamma” and “hillbilly” for bread, even though one “encompassed” the other based on the distinct difference in meaning).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

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when one term is merely a subset of the other, confusion may be unlikely.

**ii. Examining Attorney's "Subjective Evaluation"
Unsupported by Evidence.**

The Examining Attorney responds to Applicant's case law, not by arguing against its applicability, but by summarily dismissing it: "The determination of likelihood of confusion is a 'subjective evaluation' in which prior decisions are of little value."⁸ However, the Examining Attorney's subjective evaluation is not unbridled. Rather, "the examining attorney must always support his or her action with relevant evidence . . ." as required by TMEP §710.01.⁹

Here, the Examining Attorney repeatedly reaches conclusions with no supporting evidence. For example, he claims "consumers are not likely to think about specific biological differences between a bull and a cow when choosing a beer. . . The general impression *to the average consumer of beer* is that a cow would include a male bovine."¹⁰ But without evidence, how do we know (a) whether consumers will think about biological differences, or (b) what the "general impression" is to the "average consumer of beer." As another example: The Examining Attorney criticized a website that used solely the gender specific meanings of "cow" and "bull", arguing "[c]learly, the consumers using this website would not be considered to be in the demographic of the average beer consumer."¹¹ Again, without evidence, how do we know the "demographic of the average beer consumer," or whether users of the website fall within the beer drinking demographic.

The Examining Attorney quotes *Star Watch Case v. Junghans* for his contention that the

⁸ See p.5 of Examining Attorney's Brief (quoting *Star Watch Case Co. v. Junghans, A.G.*, 267 F.2d 950, 122 U.S.P.Q. 370 (C.C.P.A. 1959)).

⁹ See TMEP §710.01 (stating "the examining attorney must always support his or her action with relevant evidence . . .").

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¹¹ See p.4 of Oct. 23, 2014, Office Action letter.

matter is left to his “subjective evaluation.”¹² However, even that opinion requires that “[e]ach case must rest upon its own *distinctive fact situation*.”¹³ That is, any “subjective evaluation” must rest on facts, and not the Examining Attorney’s unsubstantiated speculation.

And when Applicant confronted the Examining Attorney with actual evidence of “the average consumer of beer’s” frame of mind, he dismisses it as “based on inferences and speculation.”¹⁴ Specifically, the Applicant submitted evidence of a brewer that named its beer “Bull Testicle Beer”, all as discussed in Applicant’s Brief.¹⁵ Applicant’s Brief argues:

“[i]t is a reasonable conclusion that ‘bull’ is used because consumers and readers would be confused had the article referenced ‘cow testicles,’ or had the beer been called ‘Cow Testicle Beer.’ Or, at least both the brewer and author felt the need to be grammatically correct or risk heavy criticism from consumers for confusing a bull and cow. Regardless, it is evidence of how the ‘average purchaser of beer’ defines the two terms.”¹⁶

The Examining Attorney dismisses the conclusion as based on “inference and speculation,” and that “because no logical conclusions can be drawn from the article . . . [it] should be given no weight.”¹⁷

On the contrary, there is nothing “speculati[ve]” about the anatomical fact that cows do not have testicles. And, it is a reasonable “inference” that the brewer used “bull” instead of “cow” because he felt the need to be anatomically correct when naming the beer – *i.e.*, the name of the beer is how consumers will identify the beer, and using “cow” would have confused consumers about what they were buying. For example, it is a reasonable inference than an egg farmer would not call its eggs “Rooster Eggs” because it would risk confusing potential consumers about what they were buying – *i.e.*, the average egg buyer knows the difference

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¹³ *Star Watch Case Co.*, 267 F.2d at 931.

¹⁴ See p.9 of Examining Attorney’s Brief.

¹⁵ See pp.9-10 of Applicant’s Brief.

¹⁶ *Id.*

¹⁷ See p.9 of Examining Attorney’s Brief.

between a hen and a rooster.

Moreover, the Examining Attorney's summary dismissal of "inference[s]" drawn from evidence misstates the law. On the contrary, "[w]hether confusion is likely is proved by *inference* drawn from the totality of relevant facts . . ."¹⁸ The Applicant has drawn reasonable inferences based on evidence.

iii. Examining Attorney's Unsupported Inference.

Despite his dismissal of inference, the Examining Attorney tries to draw some of his own in his Brief. However, like his Office Action letters, the inferences are unsupported by evidence and therefore mere speculation. For example, he claims that consumers are likely to believe that beer sold under the marks originate from the same manufacturer because,

"a consumer who encounters the COW CREEK mark used in connection with an ale or lighter beer is likely to believe that a beer under the BULL CREEK BREWERY marks identifies a stout or heavier beer from the same source."¹⁹

The Brief cites no evidence because the Examining Attorney submitted none during the examination process. Whether consumers would associate "Cow Creek" with a light beer and "Bull Creek" with a stout is pure, unsupported speculation; not inference from evidence.

iv. Applicant Has not Ignored "Creek."

The Examining Attorney claims that

"Applicant's arguments focus solely on the gender differences between 'cow' and 'bull' *without any reference to the fact that the connotation of each of the marks is that of a creek named for a type of bovine.*"²⁰

Also,

¹⁸ *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 166 F.3d 197, 206 (3rd Cir. 1999) (emphasis added) (quoting Richard L. Kirkpatrick, LIKELIHOOD OF CONFUSION IN TRADEMARK LAW, §1.8 (PLI, 1997)).

¹⁹ See p.8 of Examining Attorney's Brief (capitalization original).

²⁰ See pp.4-5 of Examining Attorney's Brief (emphasis added).

“Applicant’s arguments and evidence focus solely on the anatomical differences between the male and female bovine.”²¹

This is wholly untrue. Applicant’s Brief cites evidence of two instances in which “Cow Creek” and “Bull Creek” were used to name adjacent creeks; all to make the point that the names were sufficiently distinctive that nobody was likely to mistake one creek for the other, despite both names’ reference to a bovine and the creeks’ close proximity to one another.²²

In addition to the geographic evidence, Applicant’s Brief includes a substitution exercise to demonstrate the unlikelihood of confusion, asking the reader to “substitute the following sets of terms into the phrase “_____ Creek.”²³ The sets of terms to be substituted included “Hen v. Rooster; Bitch v. Dog; ... Sow v. Boar,” and “Chicken v. Rooster; Dog v. Bitch; Human v. Male; Elephant v. Bull; and Pig v. Boar.”²⁴ So, Applicant did not ignore the relevance of “creek” to the analysis.

Even had the Applicant “focus[ed]” solely on the gender differences,” that would be understandable in light of the Examining Attorney’s two suspension letters and two Office Action letters. The overwhelming focus of all four documents is the definition of “cow” and “bull,” arguing that the gender specific definitions should be disregarded in favor of the Examining Attorney’s gender neutral, “informal” definition. Indeed, the thematic paragraph of the last Office Action letter frames the Examining Attorney’s argument: “Because the term ‘cow’ would also include a ‘bull,’ the commercial impression of each mark is nearly identical.”²⁵ He does not mention the term “creek” as creating the “identical” impression. The Applicant’s responses to the Office Action letters and its Brief were simply responding to the Examining

²¹ See p.7 of Examining Attorney’s Brief.

²² See pp.10-11 of Applicant’s Brief.

²³ See pp.17-18 of Applicant’s Brief.

²⁴ Id.

²⁵ See pp.1-2 of Sept. 9, 2014, Office Action letter.

Attorney's prior arguments.

v. More on Applicant's Geographic Evidence.

The creek naming evidence deserves two brief, additional comments. First, the Examining Attorney incorrectly claims the Applicant submitted evidence of only one locale using "Bull Creek" and "Cow Creek."²⁶ On the contrary, the Applicant cited two states where this occurred – New Mexico and Montana – as discussed in its Brief.²⁷

Second, the Examining Attorney again eschews drawing inferences from the evidence: Specifically, he claims there is no evidence that the people who named the creeks took into account the possibility of confusion, and dismissed that possibility.²⁸ On the contrary, it is a reasonable inference drawn from the evidence – *i.e.*, that whoever named the two creeks found "cow" and "bull" sufficiently distinctive to avoid mistaking one for the other, despite their very close proximity. Again, "[w]hether confusion is likely is proved by *inference* drawn from the totality of relevant facts . . ."²⁹

Finally, the Examining Attorney's disdain for inference did not stop him from claiming "likelihood of confusion is not a consideration for naming geographic places or things."³⁰ He supported the claim with no evidence, thereby making it pure speculation. Moreover, it is contrary to the objectively verifiable reason for using different names for geographic places: That is, were places in close proximity named identically, people would likely be confused about which was which.

²⁶ See p.9 of Examiner's Brief (citing only the Montana example).

²⁷ See pp.10-11 of Applicant's Brief.

²⁸ See p.9 of Examining Attorney's Brief.

²⁹ *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 166 F.3d 197, 206 (3rd Cir. 1999) (emphasis added) (quoting Richard L. Kirkpatrick, *LIKELIHOOD OF CONFUSION IN TRADEMARK LAW*, §1.8 (PLI, 1997)).

³⁰ See p.2 of Sept. 9th, 2014, Office Action letter.

vi. Case Law as a Litmus Test.

The Examining Attorney dismisses Applicant's case law that found no confusion when one mark was a subset of the other, accusing Applicant of trying to establish "a litmus test for word marks that are interchangeable or subsets of each other."³¹ On the contrary, Applicant discussed the cases solely to make the point that courts and the TTAB have repeatedly held that where one mark is merely a subset of another – as opposed to being "synonymous," "identical," or "interchangeable" – courts may find no likelihood of confusion. That is especially the case when the examining attorney has submitted no evidence to support his speculation that,

"consumers are not likely to think about specific biological differences between a bull and a cow when choosing a beer. . . The general impression *to the average consumer of beer* is that a cow would include a male bovine."³²

PRAYER

Applicant respectfully contends that for reasons discussed above, "Cow Creek" is not likely to cause confusion with "Bull Creek Brewery", and that a notice of publication should issue for the Applicant's mark in International Class 032.

Respectfully submitted,



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³¹ See p.5 of Examining Attorney's Brief.


³² See p.2 of Sept. 9, 2014, Office Action letter (emphasis added).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the following individual by certified mail on the 30th day of January, 2015:

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Justin M. Welch

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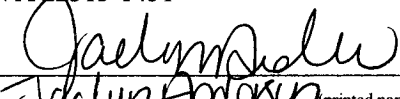
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was merely a subset of another – *i.e.*, the meanings were neither “synonymous” nor “identical.”³ That is, whether the marks were “interchangeable” *was* relevant to determining likelihood of confusion.

Moreover, two of the cases directly contradict the Examining Attorney’s argument that the common term “creek” renders the meanings of “bull” and “cow” “irrelevant.” These involved the marks “Dawn Donut” versus “Daylight Donut”, and “Railbird” versus “Game Bird”; the latter two marks being used for hats.⁴ In both, the courts found that, although one of the terms was a subset of the other, they were neither “synonymous” nor “identical” and, therefore, confusion was unlikely.⁵ More importantly, both marks contained common terms, and neither court disregarded the meanings of the uncommon terms as “irrelevant” simply because both marks shared the common terms.⁶

Finally, TMEP §1201.01(b)(v) allows comparison of meaning to determine likelihood of confusion. Both cases cited by the rule found a likelihood of confusion where terms were “used interchangeably” or were “synonyms for one another.”⁷ So, “interchangeab[ility]” is not “irrelevant.” That is, “interchangeable” terms can create a likelihood of confusion, whereas

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¹⁹ See p.8 of Examining Attorney's Brief (capitalization original).

²⁰ See pp.4-5 of Examining Attorney's Brief (emphasis added).

“Applicant’s arguments and evidence focus solely on the anatomical differences between the male and female bovine.”²¹

This is wholly untrue. Applicant’s Brief cites evidence of two instances in which “Cow Creek” and “Bull Creek” were used to name adjacent creeks; all to make the point that the names were sufficiently distinctive that nobody was likely to mistake one creek for the other, despite both names’ reference to a bovine and the creeks’ close proximity to one another.²²

In addition to the geographic evidence, Applicant’s Brief includes a substitution exercise to demonstrate the unlikelihood of confusion, asking the reader to “substitute the following sets of terms into the phrase “_____ Creek.”²³ The sets of terms to be substituted included “Hen v. Rooster; Bitch v. Dog; ... Sow v. Boar,” and “Chicken v. Rooster; Dog v. Bitch; Human v. Male; Elephant v. Bull; and Pig v. Boar.”²⁴ So, Applicant did not ignore the relevance of “creek” to the analysis.

Even had the Applicant “focus[ed]” solely on the gender differences,” that would be understandable in light of the Examining Attorney’s two suspension letters and two Office Action letters. The overwhelming focus of all four documents is the definition of “cow” and “bull,” arguing that the gender specific definitions should be disregarded in favor of the Examining Attorney’s gender neutral, “informal” definition. Indeed, the thematic paragraph of the last Office Action letter frames the Examining Attorney’s argument: “Because the term ‘cow’ would also include a ‘bull,’ the commercial impression of each mark is nearly identical.”²⁵ He does not mention the term “creek” as creating the “identical” impression. The Applicant’s responses to the Office Action letters and its Brief were simply responding to the Examining

²¹ See p.7 of Examining Attorney’s Brief.

²² See pp.10-11 of Applicant’s Brief.

²³ See pp.17-18 of Applicant’s Brief.

²⁴ Id.

²⁵ See pp.1-2 of Sept. 9, 2014, Office Action letter.

Attorney's prior arguments.

v. More on Applicant's Geographic Evidence.

The creek naming evidence deserves two brief, additional comments. First, the Examining Attorney incorrectly claims the Applicant submitted evidence of only one locale using "Bull Creek" and "Cow Creek."²⁶ On the contrary, the Applicant cited two states where this occurred – New Mexico and Montana – as discussed in its Brief.²⁷

Second, the Examining Attorney again eschews drawing inferences from the evidence: Specifically, he claims there is no evidence that the people who named the creeks took into account the possibility of confusion, and dismissed that possibility.²⁸ On the contrary, it is a reasonable inference drawn from the evidence – *i.e.*, that whoever named the two creeks found "cow" and "bull" sufficiently distinctive to avoid mistaking one for the other, despite their very close proximity. Again, "[w]hether confusion is likely is proved by *inference* drawn from the totality of relevant facts"²⁹

Finally, the Examining Attorney's disdain for inference did not stop him from claiming "likelihood of confusion is not a consideration for naming geographic places or things."³⁰ He supported the claim with no evidence, thereby making it pure speculation. Moreover, it is contrary to the objectively verifiable reason for using different names for geographic places: That is, were places in close proximity named identically, people would likely be confused about which was which.

²⁶ See p.9 of Examiner's Brief (citing only the Montana example).

²⁷ See pp.10-11 of Applicant's Brief.

²⁸ See p.9 of Examining Attorney's Brief.

²⁹ *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 166 F.3d 197, 206 (3rd Cir. 1999) (emphasis added) (quoting Richard L. Kirkpatrick, LIKELIHOOD OF CONFUSION IN TRADEMARK LAW, §1.8 (PLI, 1997)).

³⁰ See p.2 of Sept. 9th, 2014, Office Action letter.

vi. Case Law as a Litmus Test.

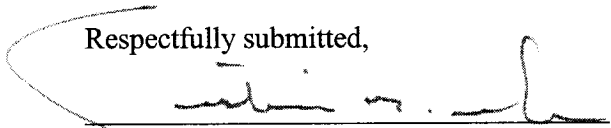
The Examining Attorney dismisses Applicant's case law that found no confusion when one mark was a subset of the other, accusing Applicant of trying to establish "a litmus test for word marks that are interchangeable or subsets of each other."³¹ On the contrary, Applicant discussed the cases solely to make the point that courts and the TTAB have repeatedly held that where one mark is merely a subset of another – as opposed to being "synonymous," "identical," or "interchangeable" – courts may find no likelihood of confusion. That is especially the case when the examining attorney has submitted no evidence to support his speculation that,

"consumers are not likely to think about specific biological differences between a bull and a cow when choosing a beer. . . The general impression *to the average consumer of beer* is that a cow would include a male bovine."³²

PRAYER

Applicant respectfully contends that for reasons discussed above, "Cow Creek" is not likely to cause confusion with "Bull Creek Brewery", and that a notice of publication should issue for the Applicant's mark in International Class 032.

Respectfully submitted,



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³¹ See p.5 of Examining Attorney's Brief.

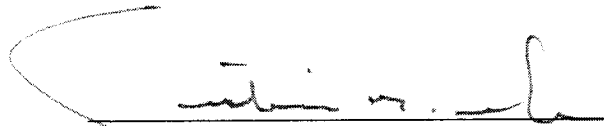
³² See p.2 of Sept. 9, 2014, Office Action letter (emphasis added).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the following individual by certified mail on the 30th day of January, 2015:

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A handwritten signature in black ink, appearing to read "Justin M. Welch", is written over a horizontal line.

Justin M. Welch